89-1183

No. _____

In The

Supreme Court Of The United States

OCTOBER TERM, 1989

ALFRED TRUMPOLD AND LINDA TRUMPOLD
Petitioners

v.

ROBERT BESCH AND THE DOUGLAS BATTERY CORPORATION
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE STATE OF CONNECTICUT

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QUESTIONS PRESENTED

1. In basing its decision on a critical fact that was not in the evidence, did the Appellate Court of the State of Connecticut violate petitioners' Fourteenth Amendment right to due process in an appeal, in conflict with decisions of the Supreme Court of the United States?

2. In this personal injury case, was the Fourteenth Amendment due process right to counsel violated by permitting defense counsel to ask questions about when a plaintiff called her lawyer; and in repeated questioning about the attorney-client contact, directed to events that the defense emphasized; and when the lawyer who was called was the lawyer who tried the plaintiffs' case before a jury?

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The petitioners, Alfred Trumpold and Linda Trumpold, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Appellate Court of the State of Connecticut, entered in the above-entitled proceeding on June 5, 1989.

OPINIONS BELOW

The opinion of the Appellate Court of the State of Connecticut is reported at 19 Conn. App. 22; 561 A.2d 438 (1989). The complete text of the opinion is printed in the Appendix at pages 1A-10A.

The unreported order of the Appellate Court denying the Motion for Reargument or Reconsideration is printed in the Appendix at page 11A.

The unreported order of the Supreme Court dated September 27, 1989, denying the petition for certification is printed in the Appendix at page 12A. The unreported order of the Supreme Court dated October 25, 1989, denying the motion for reconsideration is printed in the Appendix at page 13A.

JURISDICTION

The judgment of the Appellate Court of the State of Connecticut was entered on June 5, 1988, affirming the jury verdict and the trial court's denial of petitioner's post-trial motions. The Appellate Court denied a timely motion for reargument or reconsideration on July 6, 1989. Thereafter, the Supreme Court of the State of Connecticut denied a timely petition for certification on September 27, 1989, and a timely motion for reconsideration on October 25, 1989. This petition for certiorari is filed within ninety (90) days of the October 25, 1989 denial of the motion for reconsideration. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The due process clause of the Fourteenth Amendment to the Constitution of the United States is pertinent to a consideration of this petition. Section 1 of the Fourteenth Amendment is printed in the Appendix at page 17A.

STATEMENT OF THE CASE

A. CHRONOLOGY

This appeal arises from a personal injury action brought by the petitioners, Alfred and Linda Trumpold, husband and wife, against Robert Besch and the Douglas Battery Corporation, as the result of a light-impact automobile collision in Wallingford, Connecticut on July 21, 1981 at about 4:30 p.m., in which the Trumpold car was struck from behind by the Douglas Battery Corporation car operated by Mr. Besch.

After the collision Mr. and Mrs. Trumpold and their family went home. Linda called her father and the police. The Trumpolds then went to the emergency room at World War II Veterans Memorial Hospital in Meriden, arriving by 5:10 p.m., forty minutes after the collision. (T.[1] Linda Trumpold's video deposition, 6/8/87, shown to the jury, 7/21/87, p. 128; quoted at pages 4–5 of this petition); (Trial Exhibit O). The night of the collision Linda called Mr. Besch. The day after the collision, ("or the day after that"), she called her attorney, Richard Jacobs, who represented Mr. and Mrs. Trumpold at their jury trial. (T. Linda Trumpold's video deposition, pp. 4–5, *infra.)*

On July 22nd, the day after the collision, Linda and Alfred went to the Wallingford Police station, where Linda met with Officer Donald McNeil and with Mr. Besch. Linda reported that both she and Alfred had been injured. (Trial Exhibit M.) That morning Alfred Trumpold called in to work to say that he would be out.

On July 23, 1981, two days after the collision, Alfred and Linda Trumpold went to the office of Dr. Leonard Fasano, a general practitioner in New Haven, where they were both

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[1] "T" followed by the name of a witness, a date in 1987, and a number, refers to a page of the trial transcript.

treated. Alfred subsequently had two operations on his back. Both operating surgeons testified that Alfred's back problems and surgery after the collision were causally related to the collision. The defense's doctor testified that the collision "ignited" Alfred's back problems. Alfred had had back surgery before the accident by one of the surgeons who also operated on him after the accident, but at the time of the accident Alfred was fully employed as a machinist.

Alfred Trumpold's medical expenses came to $17,272.55. The present value of his lost earnings and fringe benefits, based on total and permanent disability, was $738,000.00. Mr. Trumpold has been receiving Social Security payments, retroactive to the summer of 1981, for total disability because of his low back condition.

Defense counsel interrogated Linda Trumpold about when she called her lawyer, Richard Jacobs:

Q. You left the scene of this accident and you went home?

A. Yes.

Q. And it was at that time when you got home that you called your father?

A. Yes.

Q. And you called the police department?

A. Yes. –

Q. Now, who else did you call?

A. I called — we went to the hospital first.

Q. All right. Who else did you call that night?

A. I called Mr. Besch.

Q. Who else did you call besides Mr. Besch?

A. I don't remember calling anyone else.

Q. Do you recall calling Mr. Jacobs that night or the day after?

A. It might have been the day after. I'm not sure, or the day after that.

Q. You don't know when you called Mr. Jacobs?

A. No, I don't remember exactly which — I don't think it was the day of the accident, though.

Q. You spoke with Mr. Jacobs before you went up to see the police, did you?

A. Yes, I did.

(T. Linda Trumpold, video deposition, p. 128.)

Objections to Linda Trumpold's video deposition were argued out of the presence of the jury (App. pp. 14A–16A). Attorney Jacobs objected to defense counsel's interrogating Mrs. Trumpold about when she called her lawyer, and whether that was before she went to the police station. The Appellate Court's opinion does not mention the objection to the question, "You spoke with Mr. Jacobs before you went to see the police, did you?" (19 Conn. App. 22, 25; App. p. 3A; 561 A.2d 438, 439; transcript of objections printed at App. pp. 14A–16A.) The plaintiffs claimed that the questions were not relevant and that they violated the attorney-client privilege.

Defense counsel later questioned Alfred Trumpold about when his wife called the lawyer:

Q. Okay. Then you got in your car and you drove home?

A. Yes, sir.

Q. When you got home, is it your testimony that your wife had started making calls to various people to get instructions about what she ought to do?

A. No sir.

Q. Did your wife call her father?

A. Yes sir.

Q. And who else did she call?

A. The police station.

Q. Who else did she call?

A. That's all I know before we went to the hospital.

Q. I see. Is it your recollection that she called Att. Jacobs that night or the next morning?

A. I don't —

[OBJECTION]

* * *

MR. ZEMETIS [defense counsel]: Alright [sic]. Your wife has testified that she called Att. Jacobs?

A. Yes sir.

Q. When did she call Att. Jacobs?

A. I don't remember sir.

Q. Do you remember if it was that night?

A. I don't think so.

Q. Do you remember if it was before you went to the hospital?

A. I don't believe so, no sir.

Q. Do you remember if it's when you came back from the hospital?

A. No sir, I think it was the next day after we got back from the police station.

Q. Your wife has said she called him before she went to the police station, is that your recollection or you don't recall?

A. I don't remember exactly sir.

Q. Alright [sic]. Is that before you called into work?

A. I called into work the morning of the 22nd.

Q. Before you called Mr. Jacobs or afterwards?

A. I don't remember.

(T. Alfred Trumpold, 7/19/87, pp. 67-69.)

The defense claimed in summation that when Alfred Trumpold called in to work the day after the accident he said he would be out "indefinitely." (T. Zemetis, summation, 8/15/87, p. 10.)

The jury found liability ninety percent to ten percent in favor of Alfred Trumpold, the driver. It found his total damages to be $1,650.12, and, applying the ten percent

reduction for comparative negligence, brought in a verdict for $1,485.10. There was a defendants' verdict on Linda Trumpold's claim for loss of consortium.

The plaintiffs filed a motion to set aside the verdict, a motion for additur, and a motion for a new trial. Oral argument on these motions was heard on December 18, 1987 by Judge Donald T. Dorsey. The motions were denied and judgment entered on February 1, 1988. The plaintiffs appealed to the Appellate Court of the State of Connecticut from the final judgment, the verdicts, and denial of the plaintiffs' post-trial motions, and sought a new trial on the issues of damages. The Appellate Court found no error:

> The plaintiffs argue that defense counsel asked these questions [about when the attorney was called] in order to encourage the jurors to infer that the plaintiffs' attorney guided them in pressing their claim to fullest advantage, and to play upon the public's mistrust of attorneys. The defendants counter that the testimony of the parties concerning the force of the impact of the colliding vehicles and the severity of resulting injury was so disparate that the jury was entitled to examine this testimony. The defendants contend that Alfred Trumpold could not have been and was not injured whereas Alfred Trumpold claims he was severely injured. The defendants argue that the court properly allowed the evidence because Linda Trumpold's actions following the accident tended to corroborate the defendant's version of the occurrence, because *Alfred Trumpold did not seek medical assistance immediately following the accident, but instead consulted an attorney.* [Emphasis supplied]

After reading the transcripts and considering all other relevant information, we agree with the defendants that *asking the plaintiffs when they first contacted their attorney following the accident was*

permissible on these particular facts. Under other factual circumstances, such evidence might be inadmissible. 19 Conn. App. 22, 26 (1989) (App. p. 4A); 561 A.2d 438, 440 [Emphasis supplied].

* * *

The trial court, in its discretion, could have concluded that the information was useful to the jury in assessing the parties' testimony concerning the nature of the accident, and on cross-examination the defendants were entitled to demonstrate to the jury apparent weaknesses in the plaintiffs' testimony educed during direct examination. The trial court did not abuse its discretion in making that evidentiary ruling and we do not find that injustice occurred as a result of that ruling. 19 Conn. App. 22, 27 (1989) (App. p. 5A) 561 A.2d 438, 440.

Nowhere in the trial record is there evidence that Alfred Trumpold consulted an attorney before seeking medical assistance. The factual circumstances were that the lawyer was called, at the earliest, the morning after the day of the accident. The Appellate Court's statement that the defendants argued that Mr. Trumpold consulted an attorney before seeking medical assistance is incorrect. The defendants did not argue that at any time.

Mr. and Mrs. Trumpold filed a motion for reargument or reconsideration by the Appellate Court, which was denied. They filed a petition for certification by the Supreme Court of the State of Connecticut from the Appellate Court's decision affirming the jury verdict. That petition was denied. They filed a motion for reconsideration of the petition for certification. In plaintiffs' memorandum in support of this last motion they asked that the defendants in their statement in opposition point out the place in the record where there was evidence that Alfred Trumpold consulted an attorney before seeking medical assistance. The defendants did not respond to this request. The motion for reconsideration was denied.

B. HOW THE FEDERAL QUESTIONS WERE RAISED

1. Fourteenth Amendment Due Process In An Appeal: Right Not To Have Appeal Decided On Non-Existent Facts

The plaintiffs filed a motion for reargument or reconsideration by the Appellate Court, claiming that the opinion of the Appellate Court is in error in the following respects:

1. Holding that the evidence supported a finding that Linda Trumpold's calling a lawyer the day after the accident tended to corroborate the defendant's version of the occurrence and was a basis for impeaching credibility.

2. In holding that the evidence supported a finding that Alfred Trumpold did not seek medical assistance immediately following the accident but instead consulted a lawyer.

3. In misconstruing the evidence, as cited in paragraphs 1 and 2, above, the Appellate Court has decided the case on a set of facts not supported by the evidence, thus depriving the plaintiffs-appellants of due process of law, in violation of Article I, Section 10 of the Constitution of the State of Connecticut and the Fourteenth Amendment to the Constitution of the United States.

Plaintiffs' memorandum of law in support of motion for reargument or reconsideration argued these points.

The plaintiffs filed a petition for certification to the Supreme Court of the State of Connecticut. One of the questions on which certification was sought was:

(D) Did the appellate court violate the plaintiffs' due process rights (U.S. Constitution, Fourteenth Amendment; Connecticut Constitution, Article I, § 10) in an appeal:

1. In holding that the record supported a finding that Alfred Trumpold did not seek medical assistance immediately following the accident but instead consulted a lawyer?

Plaintiff's memorandum of law in support of the petition argued this issue.

The plaintiffs filed a motion for reconsideration of the petition for certification by the Supreme Court of the State of Connecticut, claiming that the opinion of the Appellate Court is in error in the following respects:

1. In holding that the evidence supported a finding that Alfred Trumpold did not seek medical assistance immediately following the accident but instead consulted a lawyer, thus depriving the plaintiffs-appellants of due process of law, in violation of Article I, Section 10 of the Constitution of the State of Connecticut and the Fourteenth Amendment to the Constitution of the United States.

2. In holding that the evidence supported a finding that Linda Trumpold's calling a lawyer the day after the accident tended to corroborate the defendant's version of the occurrence [accident] and was a basis for impeaching credibility, thus depriving the plaintiffs of due process of law in violation of Article I, Section 10 of the Constitution of the State of Connecticut and the Fourteenth Amendment to the Constitution of the United States.

In their memorandum in support of that motion to reconsider the plaintiffs stated:

> The United States Supreme Court has held that due process forbids a court to find critical facts without evidence. *Creswill v. Knights of Pythias,* 225 U.S. 246

(1912); *Fiske v. Kansas*, 244 U.S. 380 (1926); *Sterling v. Constantin*, 287 U.S. 378 (1932); *Time, Inc. v. Firestone*, 424 U.S. 448 (1976). See Stern, Gressman & Shapiro, *Supreme Court Practice* § 3.29 (6th ed. 1986).

2. Fourteenth Amendment Due Process: Right To Counsel

The plaintiffs first raised the claim that the questions as to when the lawyer was first contacted violated the constitutional right to counsel in their brief in support of their motions to set aside verdict, for additur and for new trial:

> Whatever the public may think of lawyers, a person's right to consult and retain a lawyer is cherished in our country. This right is constitutionally protected. (Page 38)

In their brief on appeal to the Connecticut Appellate Court on the plaintiffs' claim that "Violating the Attorney Client Privilege Impinges on the Constitutional Right to Counsel," citing Fifth and Fourteenth Amendment Due Process. (Page 8.)

> Permitting questions to witnesses and comments in argument about whether and when a party consulted an attorney violates the attorney-client privilege and impinges on the right to counsel. (Page 9)

The issue of due process right to counsel was also stated in plaintiffs' reply brief.

The Appellate Court opinion states:

> In light of our holding that defense counsel's questions did not abridge the plaintiffs' attorney-client privilege, we decline to examine the plaintiffs'

argument that, because their privilege was violated, so were their state and federal constitutional rights to counsel. 19 Conn. App. 22, 28 footnote *4* (App. p. 6A); 561 A.2d 438, 441.

The petition to the Connecticut Supreme Court for certification asked:

(A) Was the attorney-client privilege violated by defense counsel asking when a plaintiff contacted an attorney, and directing that questioning to events the defense emphasized in summation?

(B) Did questions asking when the lawyer was contacted violate due process and constitutional rights to counsel (U.S. Constitution, Fourteenth Amendment; Connecticut Constitution, Article I, § 10)?

REASONS FOR GRANTING THE WRIT

I. IN BASING ITS OPINION ON THE NONEXISTENT CRITICAL "FACT" THAT ALFRED TRUMPOLD CALLED A LAWYER BEFORE GOING TO THE HOSPITAL, THE APPELLATE COURT VIOLATED PETITIONERS' FOURTEENTH AMENDMENT DUE PROCESS RIGHTS, IN CONFLICT WITH DECISIONS OF THE SUPREME COURT OF THE UNITED STATES.

A. A Critical Fact Not In The Evidence

The Supreme Court of the United States has held that due process forbids a court to find critical facts without evidence. *Creswill v. Knights of Pythias*, 225 U.S. 246, 261 (1912); *Fiske v. Kansas*, 244 U.S. 380, 385 (1926); *Time, Inc. v. Firestone*, 424 U.S. 448, 463 (1976). See Stern, Gressman & Shapiro, *Supreme Court Practice* § 3.29 pp. 185-187 (6th ed. 1986).

> While it is true that upon a writ of error to a state court we [Supreme Court] do not review findings of fact, nevertheless two propositions are as well settled as the rule itself, as follows: (a) that where a Federal right has been denied as the result of a finding of fact which it is contended there was no evidence whatever to support and the evidence is in the record the resulting question of law is open for decision . . . *Creswill*, 225 U.S. at 261.

In *Trumpold* the Appellate Court's decision denied the plaintiffs the federal right of due process of law under the Fourteenth Amendment. The plaintiffs made this claim in their motion for reargument or reconsideration in the Appellate Court, in the petition for certification to the Supreme Court of the State of Connecticut, and in the motion for rehearing of that petition.

The Appellate court has held that the jury in *Trumpold* could have found that Alfred Trumpold did not seek medical assistance immediately following the accident, but instead consulted an attorney. 19 Conn. App. 22, 26; App. p. 4A; pp. 8-9, *supra*). There was no evidence that that was what Mr. Trumpold did. He was logged into the hospital emergency room forty-five minutes after the accident, his wife five minutes earlier. The lawyer was called no earlier than the next day. Although the Supreme Court of the United States generally accords great deference to the findings of fact in state courts,

> . . . that deference is predicated on our belief that at some point in the state proceedings some fact-finder has made a conscious determination of the existence or nonexistence of the critical fact. Here the record before us affords no basis for such a conclusion. *Time v. Firestone*, 424 U.S. 448, 463.

In *Trumpold*, as in *Time*, the record affords no basis for the critical finding that the Trumpolds called their attorney before seeking medical assistance. Such a finding without evidence to support it violated Alfred and Linda Trumpold's right to Fourteenth Amendment due process. The Appellate Court's holding conflicts with the Supreme Court cases cited above. The *Trumpold* holding is not just an appellate ruling that is not supported by the trial record. It is the Appellate Court's distortion of the facts that are in the trial record.

Every litigant, civil and criminal, in a state court has the Fourteenth Amendment due process right to have their case decided on the facts in evidence. This applies to facts found by juries and courts. *Creswill v. Knights of Pythias*, 225 U.S. 246, 261 (1912); *Thompson v. City of Louisville*, 362 U.S. 199 (1960); *Vachon v. New Hampshire*, 414 U.S. 478, 479-80 (1974).

The integrity of the appellate process requires that an appellate court base its opinion on the true facts. Fourteenth Amendment due process requires this. To allow the Appellate Court's holding in this case to stand would deprive Alfred and Linda Trumpold of due process of law. It would subject all who come to courts of appeal after them to the risk of having their appeal decided on false facts. The real law to come out of *Trumpold* would not be in the case reports. That law would be that an appellate court can base its decision on non-existent facts, and nobody will ever know.

Trumpold will be precedent. Judges and lawyers will sift through its facts. *Trumpold* will be cited for the proposition that if you call a lawyer before getting medical attention after an accident, then defense counsel can ask when you called a lawyer. The Constitution of the United States does not countenance case precedents based on fiction.

The Appellate Court wrote, "under other factual circumstances such evidence [of the attorney-client contact] might be inadmissible." (19 Conn. App. 22, 26, pp. 8–9, *supra*); (App. p. 4A), 561 A.2d 438, 440. Due process mandates that that court be required to decide the issue of the admissibility of that evidence under the factual circumstances that did exist in *Trumpold*. In requiring this, the Supreme Court of the United States will give guidance to the lower courts.

The effect on the law in our country of letting stand the Appellate Court's decision based on a non-fact, would be to permit appellate courts through mistake to remake the trial evidence, and by their silence to cause properly raised constitutional issues to vanish. This should shake the people's faith in the fairness of our system of justice. But the people would never know. That is what is worse.

The plaintiffs pointed out to the Appellate Court that it had made a serious error, one that deprived them of due process of law under the Constitution of the United States

and the Constitution of the State of Connecticut. The Appellate Court refused to consider its mistake. The Supreme Court of the State of Connecticut declined to exercise its discretion to hear the issue.

May the Supreme Court of the United States proclaim throughout the land its reaffirmation of the due process right to have your appeal decided on the true facts! In doing so, may the Court send word to every other court in our country that it will not sanction the negation of this right by a court's refusing to acknowledge that it has misstated the facts and by that court's refusing to give a hearing to the claim that that constitutional right has been violated!

B. Error In Appellate Court's Relevancy Ruling Caused By The False Fact

The Appellate Court has held that the inquiry as to when the lawyer was called was relevant (1) To corroborate the defendants' version of the occurrence; (2) to impeach the plaintiffs' credibility as witnesses (19 Conn. App. 22, 26-27; App. pp. 4A-5A; pp. 8-9, *supra;* 561 A.2d 438, 440). This holding was based on the erroneous conclusion that there was evidence that a lawyer was called in the forty minutes between the time of the accident and the time when Mr. and Mrs. Trumpold were in the emergency room. The holding on relevancy is rooted in the Appellate Court's misstatement of the evidence and is thus contaminated by the same deprivation of due process.

The true facts invalidate the Appellate Court's relevancy holding. Evidence that Linda Trumpold called her lawyer the day after the accident did not tend to corroborate the defendant's version of the occurrence, and was not a basis for impeaching the credibility of either Linda or Alfred Trumpold. (19 Conn. App. 22, 26; App. p. 4A; 561 A.2d 438, 440).

That Linda Trumpold called her lawyer the day after the accident in no way corroborates Mr. Besch's version of the occurrence. Only a view that there is something dishonest about calling a lawyer could lead to such a suspicion. And that suspicion would be a general one. It would not relate to any specific facts. It would tell nothing about the force of the impact. It would not tend to prove "that Alfred Trumpold could not have been and was not injured." 19 Conn. App. 22, 26; App. p. 4A; p. 8, *supra*, 561 A.2d 438, 440.

The Appellate Court holds that questioning Linda and Alfred Trumpold about when Linda called a lawyer was proper impeachment, presumably of the credibility of both Trumpolds. 19 Conn. App. 22, 26-27; (App. pp. 4A-5A); 561 A.2d 438, 440. Exercising the constitutional right to consult a lawyer cannot be grounds for testimonial impeachment. No negative inference can be permitted to be drawn from that act. See *Griffin v. California*, 380 U.S. 609, 614 (1965), holding that allowing comments on the exercise of the privilege against self-incrimination "cut down on the privilege by making its assertion costly."

Mrs. Trumpold was asked if she spoke with Attorney Jacobs before she went to see the police. Mr. Trumpold was asked if Linda's call to Attorney Jacobs was made before Mr. Trumpold called in to work the day after the accident and said he could not come to work, when he allegedly said that he would be out of work "indefinitely." (T. Alfred Trumpold 7/29/87, p. 71; T. Zemetis Summation, 8/5/87, p. 10. Defense counsel in his summation tried to make the jury think there was a causal relationship between the attorney-client conversation and Linda Trumpold's deciding to go to the police station, and what she did there. He tried to make the jury think there was a causal relationship between the attorney-client conversation and the substance of Mr. Trumpold's phone call to his employer, in which the defendants claimed he said he would be out "indefinitely."

The Supreme Court of the United States does not ordinarily review evidentiary rulings of lower courts. *Cleveland & Railway Co. v. Backus*, 154 U.S. 439, 443 (1893); *United States v. Johnston*, 268 U.S. 220, 227 (1924); *Hamling v. United States*, 418 U.S. 87, 124 (1974). But there comes a point where the ruling so offends logic and reason as to violate the due process clause of the Fourteenth Amendment. At that point the Supreme Court of the United States should intervene.

II. PETITIONERS' FOURTEENTH AMENDMENT DUE PROCESS RIGHT TO COUNSEL WAS VIOLATED BY PERMITTING DEFENSE COUNSEL TO ASK LINDA TRUMPOLD WHEN SHE CALLED A LAWYER, AND WHETHER THAT WAS BEFORE SHE WENT TO THE POLICE STATION; AND TO ASK HER HUSBAND ALFRED WHETHER THE LAWYER WAS CALLED BEFORE ALFRED CALLED IN TO WORK AND SAID AT THAT TIME THAT HE WOULD BE OUT, AS THE DEFENDANTS CLAIM, "INDEFINITELY;" AND WHEN THE LAWYER WHO WAS CALLED WAS THE LAWYER WHO TRIED PETITIONERS' CASE TO THE JURY.

The Supreme Court of the United States has said that the right to counsel in civil litigation is implicit in the concept of due process. *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932).

Federal courts of appeal have spoken on this issue. In both criminal and civil cases ". . . the right to counsel is one of constitutional dimensions and should thus be freely exercised without impingement." *Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1118 (5th Cir.) *cert. denied*, 449 U.S. 820 (1980). In holding that the right to consult counsel attaches to the right to meaningful access to the courts: "[W]hile private parties must ordinarily pay their own legal fees, they have an undeniable right to retain counsel to

ascertain their rights." *Martin v. Lauer*, 686 F.2d 24, 32 (D.C. Cir. 1982).

Permitting questions to witnesses and comments in argument about whether and when a party consulted an attorney violates the attorney-client privilege and impinges on the right to counsel. In *Trumpold*, asking these questions repeatedly of a plaintiff, and even embellishing by asking, "Do you remember if [you called your attorney] that night?" "Do you remember if it was before you went to the hospital?" "Do you remember if it's when you came back from the hospital?" "[B]efore you called into work?" as defense counsel asked Alfred Trumpold (T. Alfred Trumpold, 7/29/87, pp. 67-69; p. 7, *supra*), must not be permitted, because this practice impinges on the right to consult counsel. No fair impeachment can arise from the fact that someone sought legal advice. People must not be discouraged from seeking counsel shortly after being injured, for fear of having the fact that they contacted a lawyer early on used against them at trial.

> The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. 8 J. Wigmore, Evidence § 2290 (McNaughton rev. 1961). Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client. As we stated last Term in *Trammel v. United States*, 445 U.S. 40, 51 (1980): "The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." And in *Fisher v. United States*, 425 U.S. 391, 403 (1976), we recognized the purpose of the privilege to be "to encourage clients to make full disclosure to

> their attorneys." This rationale for the privilege has long been recognized by the Court, see *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) (privilege "is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure").

Upjohn Co. v. U.S., 449 U.S. 383, 389 (1981).

The privilege that protects confidential communications between attorney and client has to extend to protecting the initial time and place and any other information about the act of contacting an attorney. Otherwise, defense counsel can, as he did in this case, make an argument based not on inference, but on suspicion and conjecture. Defense counsel in *Trumpold* should not have been permitted to place in the minds of jurors questions about what went on between the client and the attorney that could only be rebutted by the client or the lawyer's testifying as to what their conversation was. One of the reasons for the privilege is to preserve the lawyer as an effective advocate by keeping the lawyer off the witness stand. The relationship between the client and the attorney was made an issue in *Trumpold*. To do that violated the Fourteenth Amendment due process right to counsel. How can counsel be effective when the jury before whom the lawyer is trying the case hears questioning about when that lawyer was called, with reference to events with which the defense sought to prove that the plaintiffs fabricated a case? There is no way the lawyer can defend himself/herself against this attack. The client's cause suffers.

The theme of the defendants' case was that there was a slight rear end collision and that the plaintiffs concocted a claim. The numerous references to contacting an attorney were artfully made to imply that something improper

occurred between the plaintiffs' attorney and his clients, thus playing upon the public's mistrust of lawyers.

> Because our law is clear that the privilege applies only to "information born of confidential communication," we decline to hold that the trial court's evidentiary ruling that permitted defense counsel to ask the plaintiffs, as witnesses, when they first contacted their attorney violated the confidentiality of their privileged communications. Therefore, defense counsel's summation remarks alluding to the plaintiffs' contacting their attorney did not violate the privilege. 19 Conn. App. 22, 28 (App. p. 6A).

The attorney-client contact, speculation as to the content of the privileged communication, and conjecture that the plaintiffs did things as the result of it, were the keystone of the defense strategy. (T. Zemetis, 8/15/87, Summation, p. 10 (call to employer), p. 20 (choice of doctor), p. 28 (choice of doctor). Defense counsel questioned Linda to make it appear that she was hiding something (pp. 4–5, *supra*). He asked Alfred question after question about when the lawyer was called (p. 6–7, *supra*). This clever strategy resulted in the plaintiffs being represented by a lawyer who had to try the case before a jury before whom his role and his conduct had been put in question. Only by disclosing the content of the privileged communication could what went on between client and attorney be explained. Then the question in the jury's mind would be, "Is this person telling us the truth about what went on in that conversation?" Alfred and Linda Trumpold's right to counsel was "cut down on" *Griffin v. California*, 380 U.S. 609, 614 (1965).

For a lawyer to try to win a case by playing to people's dislike for and mistrust of lawyers is unworthy of our great profession. This practice would seem to confirm what much of the public thinks of us.

When their lawyer and their contact with him were made an issue in this case, Alfred and Linda Trumpold's Fourteenth Amendment due process right to counsel was violated. The Supreme Court of the United States should put an end to this practice of undermining that precious right.

CONCLUSION

For the reasons stated above, this petition for certiorari should be granted.

Respectfully submitted,

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Counsel of Record
JOHN M. SHANNON
JACOBS, VOTRE &
JACOBS, P.C.
265 Orange Street
New Haven, Connecticut 06510
(203) 562-6111
Counsel for Petitioners

No. _____

In The

Supreme Court Of The United States

OCTOBER TERM, 1989

ALFRED TRUMPOLD AND LINDA TRUMPOLD
Petitioners

v.

ROBERT BESCH AND THE DOUGLAS BATTERY CORPORATION
Respondents

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE STATE OF CONNECTICUT

APPENDIX TABLE OF CONTENTS

Action to recover damages for personal injuries sustained by the named plaintiff in a motor vehicle accident allegedly caused by the defendants' negligence, and for other relief, brought to the Superior Court in the judicial district of New Haven and tried to the jury before *Dorsey, J.*; verdict and judgment in favor of the named plaintiff, from which the plaintiffs appealed to this court. *No error.*

Richard L. Jacobs, with whom were *Ina L. Silverman*, *John M. Shannon*, legal intern, and, on the brief, *Steven D. Jacobs*, for the appellants (plaintiffs).

William F. Gallagher, with whom were *Terence A. Zemetis* and, on the brief, *Elizabeth A. Gallagher*, for the appellees (defendants).

JACOBSON, J. This is a negligence action brought in 1983 by Alfred Trumpold, claiming damages for injuries he sustained in an automobile accident, and by his wife, Linda, for loss of consortium.[1] The complaint alleged that an automobile, owned by the defendant Douglas Battery Corporation and driven by the named defendant, collided with the rear of the plaintiffs' vehicle while it was stopped at a traffic light. The defendants' answer included a special defense of contributory negligence.

The jury returned a verdict for Alfred Trumpold, finding the defendants 90 percent negligent and Alfred Trumpold 10 percent negligent, and awarding him a total of $1485.10. The jury also returned a verdict for Linda Trumpold, but awarded zero damages. After the trial court ordered the jurors to reconsider their verdicts, they returned with the same verdict and award

[1] Linda Trumpold's claim for damages for injuries was removed from the jury's consideration by the court because she failed to establish that she had sustained expenses in excess of $400, as required by General Statutes § 38-323.

for Alfred Trumpold but changed their verdict as to Linda Trumpold to a verdict for the defendants. The plaintiffs moved to set aside the verdict, for a new trial, and for additur. After oral argument, the court denied the motions and rendered judgment in accordance with the verdicts.

The plaintiffs appeal from the judgment rendered on the verdicts and from the trial court's denial of their posttrial motions, claiming that the trial court erred (1) in permitting defense counsel to ask allegedly improper questions of the plaintiffs during trial and to refer to that testimony during summation, (2) in making an improper remark while instructing the jury, (3) in permitting defense counsel to make other improper, inflammatory and prejudicial remarks to the jury during summation, and (4) in rendering judgment on the jury's verdicts because they were against the weight of the evidence. We find no error.

The plaintiffs' initial claim is that the trial court erred when it permitted defense counsel to ask the plaintiffs when they had first contacted an attorney after the accident. The essence of their argument is that once the plaintiffs testified that they had contacted their attorney soon after the accident, the jury would believe that something improper had transpired with regard to the plaintiffs' pursuit of their claims in court. They argue that the questions were irrelevant, and that defense counsel's reference to the plaintiffs' responses to the questions during summation invaded the attorney-client privilege and violated their federal and state constitutional rights to counsel. We disagree.

First, turning to whether the trial court erred in permitting the questions over objection because they were irrelevant, we note at the outset that trial courts are given broad discretion in determining the relevancy of evidence; *State* v. *Boucino,* 199 Conn. 207, 225, 506

A.2d 125 (1986); and that their "rulings will be reversed [only] if the court has abused its discretion or where injustice appears to have been done." *State* v. *Echols*, 203 Conn. 385, 393, 524 A.2d 1143 (1987), citing *State* v. *Smith*, 198 Conn. 147, 157, 502 A.2d 874 (1985); *State* v. *Johnson*, 190 Conn. 541, 548–49, 461 A.2d 981 (1983).

"Evidence is relevant only when it tends to establish the existence of a material fact in issue or to corroborate other direct evidence in the case." *State* v. *Talton*, 197 Conn. 280, 285, 497 A.2d 35 (1985). " ' "Unless excluded by some rule or principle of law, any fact may be proved which logically tends to aid the trier in the determination of the issue. Evidence is admitted, not because it is shown to be competent, but because it is not shown to be incompetent. No precise and universal test of relevancy is furnished by the law, and the question must be determined in each case according to the teachings of reason and judicial experience." *Pope Foundation, Inc.* v. *New York, N.H. & H.R. Co.*, 106 Conn. 423, 435, 138 A. 444 [1927].' *State* v. *Towles*, 155 Conn. 516, 523, 235 A.2d 639 (1967)." *State* v. *Echols*, supra.

The following additional facts are relevant to this claim. During the trial, the jury reviewed a videotaped deposition of Linda Trumpold.[2] Before it was shown to the jury, counsel for the plaintiffs argued to the court, out of the presence of the jury, that defense counsel's cross-examination question, "Did you call Mr. Jacobs that night [after the accident] or the day after?" was irrelevant and the court should not allow the jury to review that portion of the videotape. The court overruled the objection and the jury reviewed that testimony. The plaintiffs argue that similar, improper questioning by defense counsel occurred during his cross-examination of the plaintiff Alfred Trumpold

[2] Linda Trumpold suffered from agoraphobia and could not testify in court.

when he asked, "Is it your recollection that [your wife Linda] called Attorney Jacobs that night or the next morning?"

The plaintiffs argue that defense counsel asked these questions in order to encourage the jurors to infer that the plaintiffs' attorney guided them in pressing their claim to fullest advantage, and to play upon the public's mistrust of attorneys. The defendants counter that the testimony of the parties concerning the force of the impact of the colliding vehicles and the severity of resulting injury was so disparate that the jury was entitled to examine this testimony. The defendants contend that Alfred Trumpold could not have been and was not injured whereas Alfred Trumpold claims he was severely injured. The defendants argue that the court properly allowed the evidence because Linda Trumpold's actions following the accident tended to corroborate the defendants' version of the occurrence, because Alfred Trumpold did not seek medical assistance immediately following the accident, but instead consulted an attorney.

After reading the transcripts and considering all other relevant information, we agree with the defendants that asking the plaintiffs when they first contacted their attorney following the accident was permissible on these particular facts. Under other factual circumstances, such evidence might be inadmissible.

"The trial court enjoys a liberal discretion in fixing the limits of cross-examination, particularly if it affects credibility. *State* v. *Croom*, 166 Conn. 226, 231, 348 A.2d 556 (1974); *State* v. *Marquez*, 160 Conn. 47, 52, 273 A.2d 689 (1970)." *State* v. *Ouelette*, 190 Conn. 84, 101–102, 459 A.2d 1005 (1983). "Cross-examination, in quest for the truth, provides a means for discrediting the testimony of a witness. 'When pursued for that purpose, the examination frequently and legitimately

enters into matters collateral to the main issues.' *Hirsch* v. *Vegiard*, 137 Conn. 302, 304, 77 A.2d 85 (1950). . . . Given that function of cross-examination in shedding light on the credibility of the witness' direct testimony, '[t]he test of relevancy is not whether the answer sought will elucidate any of the main issues, but whether it will to a useful extent aid the court or jury in appraising the credibility of the witness and assessing the probative value of the direct testimony.' McCormick, Evidence (2d Ed.) § 29." *State* v. *Oulette*, supra, 102.

The trial court, in its discretion, could have concluded that the information was useful to the jury in assessing the parties' testimony concerning the nature of the accident, and on cross-examination the defendants were entitled to demonstrate to the jury apparent weaknesses in the plaintiffs' testimony educed during direct examination. The trial court did not abuse its discretion in making that evidentiary ruling and we do not find that injustice occurred as a result of that ruling.

The plaintiffs next argue that, during defense counsel's summation to the jury, reference to the plaintiffs' having called an attorney violated the attorney-client privilege.[3] They cite *Rienzo* v. *Santangelo*, 160 Conn. 391, 396, 279 A.2d 565 (1971), which held, in the specific factual context of that case, that a court's ordering a witness to answer the question "Did you tell your attorney where on the premises this accident occurred?" improperly invaded the scope of the privilege.

[3] The plaintiffs take issue, inter alia, with the following language: "Now, what they do from that scene of the accident I think is important. They drive home, they sit down and they start calling people. And among the people they call that evening or the next morning are the grandfather, apparently and it's assumed, and they call the police station and they call their lawyer."

In *State* v. *Manning*, 162 Conn. 112, 120, 291 A.2d 750 (1971), our Supreme Court held that Connecticut "is in accord with the majority rule that the [attorney-client] privilege does not extend beyond communications"; therefore, "an attorney is not bound to remain silent as to all information regarding his client, but only as to that information born of confidential communication." Id., 121. Additionally, "since the privilege tends to prevent a full disclosure of the truth in court, it will be strictly construed. *Turner's Appeal*, 72 Conn. 305, 318, 44 A. 310 (1899)." C. Tait & J. LaPlante, Connecticut Evidence (2d Ed.) § 12.5.1, p. 442; 2 B. Holden & J. Daly, Connecticut Evidence (2d Ed.) § 126d, pp. 1304–1305. Because our law is clear that the privilege applies only to "information born of confidential communication," we decline to hold that the trial court's evidentiary ruling that permitted defense counsel to ask the plaintiffs, as witnesses, when they first contacted their attorney violated the confidentiality of their privileged communications.[4] Therefore, defense counsel's summation remarks alluding to the plaintiffs' contacting their attorney did not violate the privilege.

The next claim of error proffered by the plaintiffs concerns an alleged impropriety in the trial court's charge to the jury. They argue that the court's comment to the jury at the close of its charge, that "you have some difficult issues to resolve,"[5] constituted

[4] In light of our holding that defense counsel's questions did not abridge the plaintiffs' attorney-client privilege, we decline to examine the plaintiffs' argument that, because their privilege was violated, so were their state and federal constitutional rights to counsel.

[5] The court made the remark in the following context: "Well, ladies and gentlemen, believe it or not I've gone through my outline and as far as I know I have not missed anything in my outline. I am going to let you go to lunch now. It's a quarter to two. I'll expect to be back at a quarter to three. And I may or may not have something else to say to you after I've talked to the attorneys. They are my monitors. They listen to what I have to say. If they think I made a mistake they are going to tell me about them. And if I think i made a mistake and I agree with them, I will tell you about

prejudicial error because, the plaintiffs contend, the case actually was simple, and the court's comment was prejudicial to them because it altered the burden of proof to the defendants' benefit. We disagree.

Our examination of the court's charge, in its entirety, leads us to conclude that the court did not err by stating that the jury had some difficult issues to resolve. The primary function of the charge to the jury is to assist them in applying the law correctly to the facts that they find to be established. *Magnon* v. *Glickman*, 185 Conn. 234, 244, 440 A.2d 909 (1981). Our Supreme Court has long held that courts are authorized to comment on evidence when charging the jury; *Heslin* v. *Malone*, 116 Conn. 471, 477, 165 A. 594 (1933); provided they do not misstate facts or evidence, and provided the comment is reasonable and fair. Id.; *Ladd* v. *Burdge*, 132 Conn. 296, 298, 43 A.2d 752 (1945). We do not view the comment as unreasonable or unfair; rather, it was within the trial court's discretion to make such a statement to emphasize to the jurors the seriousness of the factual questions they were to resolve.[6] This claim is without merit.

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it, but I don't think I made a mistake. I won't tell you about it, but we do that because we want to carefully present the case to you. As both attorneys have said they both waited a long time for you to decide this case. And we want to give it to you in the best fashion we can. I join with the attorneys and thank you for the attention that you have given to the case. It's been an unusually long case. And you have been very attentive. You have some difficult issues to resolve. I hope I've pointed them out to you so that you don't waste your time on insubstantial issues and you get right to the heart of the matter, and you follow the procedure that I have suggested to you."

[6] We find credence in the the trial court's explanation for the remark, when it responded to the plaintiffs' claim of error in its memorandum of decision denying the plaintiffs' posttrial motions: "Looked at in the light of the evidence of [Alfred Trumpold's] preexisting serious back injury, a preexisting permanent disability, a long period of convalescence prior to returning to work [before the accident at issue in this case occurred] and a contradictory work history after returning to work after [a] disc operation, the jury did indeed have '*serious issues*' of fact to resolve in Alfred Trumpold's case." (Emphasis in original.)

The plaintiffs' third claim of error is that the trial court erred in allowing defense counsel to give a summation that was improper, inflammatory and prejudicial. Essentially, the plaintiffs argue that during closing argument, defense counsel drew attenuated inferences from testimony heard earlier, attempting to persuade the jury that the plaintiffs had exaggerated the extent of their injuries from the accident.

The transcript reveals that the plaintiffs failed to object during defense counsel's summation. In addition, the plaintiffs failed to request a curative instruction by the trial court. "The absence of any objection or exception to improper argument, which we may infer from the absence of any such indication in the transcript, has . . . been regarded as a waiver of the right to press such a claim of error." *State* v. *Austin*, 195 Conn. 496, 504-505, 488 A.2d 1250 (1985), citing *State* v. *Vitale*, 190 Conn. 219, 226, 460 A.2d 961 (1983); *Cascella* v. *Jay James Camera Shop, Inc.*, 147 Conn. 337, 343, 160 A.2d 899 (1960). See 1 B. Holden & J. Daly, Connecticut Evidence (2d Ed.) § 12, p. 76. The failure to object to the remarks at the time they were made or at the close of argument constitutes a waiver of the plaintiffs' right to press this claim of error.

We reach this result after examining the plaintiffs' argument, raised for the first time in their reply brief, that the trial court's failure to limit defense counsel's allegedly improper comments constituted plain error.[7] Plain error review is not warranted because the error complained of does not pose one of those " 'truly extraordinary situations where the existence of the error is so obvious that it affects the fairness and integ-

[7] Practice Book § 4185 provides in relevant part: "The supreme court shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial. The supreme court may in the interests of justice notice plain error not brought to the attention of the trial court."

rity of and public confidence in the judicial proceedings.' *State* v. *Hinckley*, 198 Conn. 77, 87–88, 502 A.2d 388 (1985); *Hartford Federal Savings & Loan Assn.* v. *Tucker*, 181 Conn. 607, 609, 436 A.2d 1259, cert. denied, 449 U.S. 956, 101 S. Ct. 363, 66 L. Ed. 2d 221 (1980)." *Smith* v. *Czescel*, 12 Conn. App. 558, 563, 533 A.2d 223, cert. denied, 206 Conn.803, 535 A2d 131 (1987).

The final claim advanced by the plaintiffs is that the trial court erred in rendering judgment in accordance with the verdict, because the verdict was against the weight of the evidence. We do not agree.

The plaintiffs, in their brief, list with particularity those elements of the testimony they believe the jury should have accepted. Our review of the record and transcripts, however, indicates that the jury had more than sufficient evidence on which to base its verdict and to apportion damages as it did.

"As we have noted before, '[t]here are serious constitutional issues posed by setting aside a jury verdict. This is so because " '[l]itigants have a constitutional right to have issues of fact decided by the jury.' *Bambus* v. *Bridgeport Gas Co.*, 148 Conn. 167, 169, 169 A.2d 265 (1961)." ' *Zarrelli* v. *Barnum Festival Society, Inc.*, 6 Conn. App. 322, 326, 505 A.2d 25, cert. denied, 200 Conn. 801, 509 A.2d 516 (1986). Accordingly, a court should be hesitant to set aside a jury's verdict and must only do so when the jury verdict 'so shock[s] the sense of justice as to compel the conclusion that the jury was influenced by partiality, prejudice, mistake or corruption.' *Shea* v. *Paczowski*, 11 Conn. App. 232, 233, 526 A.2d 558 (1987). 'A court should be especially hesitant to set aside a jury's award of damages.' *Zarrelli* v. *Barnum Festival Society, Inc.*, supra. ' "The assessment of damages 'defies any precise mathematical computation'; *Floyd* v. *Fruit Industries, Inc.*, 144 Conn. 659,

675, 136 A.2d 918 (1957); and, therefore, establishing damages . . . is a task peculiarly within the expertise of a jury." ' *Zarrelli* v. *Barnum Festival Society, Inc.*, supra." *Creem* v. *Cicero*, 12 Conn. App. 607, 609-10, 533 A.2d 234 (1987).

In the case before us, the trial court found nothing in the evidence that indicated it should disturb the jury's verdict.[8] Neither do we. The evidence does not compel us to conclude that "the jury's award did not fall somewhere within the necessarily uncertain limits of just damages, or that it shocked the sense of justice. See *Zarrelli* v. *Barnum Festival Society, Inc.*, supra. 'Furthermore, a parsimonious jury award is not inadequate as a matter of law.' *Shea* v. *Paczowski*, [supra, 235]." *Biagioni* v. *Aetna Life & Casualty Ins. Co.*, 16 Conn. App. 690, 693, 549 A.2d 279 (1988).

There is no error.

In this opinion the other judges concurred.

STATE OF CONNECTICUT
APPELLATE COURT

No. AC 6758

ALFRED TRUMPOLD, ET AL.

V. : JULY 6, 1989

ROBERT J. BESCH, JR. ET AL.

ORDER

THE APPELLANT'S MOTION FOR REARGUMENT OR RECONSIDERATION HAVING BEEN FILED ON JUNE 20, 1989, AND
HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY O R D E R E D DENIED.

BY THE COURT,

[signature illegible]
ASSISTANT CLERK — APPELLATE

NOTICE SENT: 7-6-89
JACOBS, VOTRE & JACOBS
SACHS, DELANEY, MARETZ & ZEMETIS
GALLAGHER & GALLAGHER
HON. DONALD DORSEY
NEW HAVEN, (CV83-0218897)
REPORTER OF JUDICIAL DECISIONS

SUPREME COURT
STATE OF CONNECTICUT

NO. PSC-89-1017

Alfred J. Trumpold et al.

v.

Robert J. Besch, Jr. et al.

ORDER ON PETITION FOR CERTIFICATION TO APPEAL

On consideration of the petition by the plaintiffs for certification to appeal from the Appellate Court (18 Conn. App. 22), it is hereby ordered that said petition be, and the same is hereby denied.

BY THE COURT,

[signature illegible]
ASSISTANT CLERK — APPELLATE

Dated: September 27, 1989

Notice to: September 27, 1989

Clerk, Superior Court, New Haven
Clerk, Appellate Court
Gallagher & Gallagher
Sachs, Delaney, Maretz & Zemetis

Richard L. Jacobs in support of petition; *William F. Gallagher,* in opposition.

STATE OF CONNECTICUT
SUPREME COURT

NO. A.C. 6758

ALFRED J. TRUMPOLD ET AL.

V.

ROBERT J. BESCH, JR., ET AL. : OCTOBER 25, 1989

ORDER

THE MOTION OF THE PLAINTIFFS, FILED OCTOBER 10, 1989, FOR RECONSIDERATION HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY O R D E R E D DENIED.

BY THE COURT,

/s/ Francis J. Drumm, Jr.
CHIEF CLERK

NOTICE SENT: 10-25-89
JACOBS, VOTRE & JACOBS
SACHS, DELANEY, MARETZ & ZEMETIS
GALLAGHER, GALLAGHER & CALISTRO
CLERK, NEW HAVEN J.D.
CV83-0218897
HON. DONALD DORSEY

TRANSCRIPT OF OBJECTIONS TO LINDA TRUMPOLD'S VIDEO DEPOSITION, TAKEN JULY 8, 1987 AND SHOWN TO JURY ON JULY 21, 1987, PAGES 34-36.

MR. JACOBS: Now on page 128 —

THE COURT: 128?

MR. JACOBS: Yes, and 129 Mr. Zemetis is cross examining on the grounds of Mrs. Trumpold called before going to the police station on the day after this collision, which was six years ago today by the way, the collision, 7/21/81. But the question that Mr. Zemetis got into on page 128 —

THE COURT: "It was at that time that you got home that you called your father and you called the police department? Who else did you call?"

"I went to the hospital first.

All right. Who else did you call that night?

I called Mr. Besch.

Who else did you call beside Mr. Besch?

I don't remember calling anyone.

Did you call Mr. Jacobs that night or the day after?

It might have been the day after. I'm not sure, or the day after that."

What do you want?

MR. JACOBS: I want the reference to her calling a lawyer be stricken because certainly what she could have told her lawyer is not relevant and the fact that she told her lawyer — the fact that she told her lawyer, that she spoke to him at all is not relevant.

THE COURT: Then the next page is "You spoke with Mr. Jacobs before you went to see the police, did you?

Yes, I did."

MR. JACOBS: And I guess what the defense would like the jury to infer is that something was told to her, that there's something in that conversation. They can't speculate to what that conversation is and I think that —

THE COURT: "Now thereafter, after this accident you went to the World War II Memorial Hospital."

MR. JACOBS: Yes.

THE COURT: Okay. I'll leave that in.

MR. JACOBS: In other words the grounds of my objection, your Honor, is that it violates the attorney/client privilege because you could not ask Mrs. Trumpold "What did your attorney say to you?" "What did you say to your attorney?" but —

THE COURT: Of course not.

MR. JACOBS: That violates the privilege. On the other hand this question which he does ask about speaking with your lawyer is irrelevant.

THE COURT: It's cross examination, counsel, and I'll leave it in.

MR. JACOBS: And it is irrelevant —

THE COURT: I understand your objection.

MR. JACOBS: — because to bring this in court could serve no useful purpose when what follows cannot be inquired into other than to get the smell of something indecent, of some dishonorable conduct into the case and I think —

THE COURT: There's nothing dishonorable about calling your lawyer.

MR. JACOBS: Well there isn't and I don't think that any question is going to be asked which would let the inference arise that a person who calls their lawyer is doing the wrong thing or that something may have gone on between the lawyer and the client.

THE COURT: Well in the latitude allowed in cross examination on bias, prejudice is — well I'll let it in.

MR. JACOBS: Thank you, your Honor. Exception

U.S. CONSTITUTION —

AMENDMENT XIV

§ 1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

89-1188

FILED
FEB 21 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In The
Supreme Court Of The United States

OCTOBER TERM, 1989

ALFRED TRUMPOLD AND LINDA TRUMPOLD
Petitioners

v.

ROBERT BESCH AND THE DOUGLAS BATTERY CORPORATION
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE STATE OF CONNECTICUT

RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI TO THE APPELLATE COURT OF THE STATE OF CONNECTICUT

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February 21, 1990

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LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below were the petitioners Alfred Trumpold and Linda Trumpold, and the respondents Robert Besch and the Douglas Battery Corporation.

Respondent Douglas Battery Corporation has no parent companies, subsidiaries, or affiliates to list pursuant to Rule 28.1

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STATEMENT OF ADDITIONAL FACTS

The parties agreed to the date, time, and location of the accident. They were at issue on every other material aspect of the case.

Alfred Trumpold testified that he was stopped at the light for about one or two minutes when he was hit from behind (T. 7/23/87, p. 74; 7a). He said that he felt pain in his lower back a couple of seconds after the crash (T. 7/23/87, pp. 75, 76; 9a).

Linda Trumpold's version of this rear-end collision was shown to the jury on videotape. She stated that she heard a big bang, and she was thrown forward. She lost her vision, and her neck hurt a lot (T. 6/8/87, p. 20; 1a). After the initial impact, she still could not see, but she heard her husband moaning. Her daughter was crying and wanted to get out of the car. In the meantime, Linda was trying to find the door handle without her vision. Her eyesight eventually came back (T. 6/8/87, p. 21; 2a). She then saw her husband clutching the steering wheel. He had tears coming out of his eyes, and he was looking in the rear view mirror as though he was in a lot of pain (T. 6/8/87, p. 22; 3a). She exited the car because she thought it was going to explode. However, she did leave the children in the car (T. 6/8/87, p. 23; 3a). After she was talking to Robert Besch for a while, she remembered that the children were still in the car, and she went back to talk to them (T. 6/8/87, p. 23; 4a).

Robert Besch testified that he tapped the bumper of the Trumpold car (T. 8/3/87, p. 5; 36a). He stepped out of his car, walked to the front of it, and met Linda Trumpold who was standing at the right rear quarter of her car (T. 8/3/87, p. 6; 37a). The only damage to his car was on the black bumper pad (T. 8/3/87, p. 8; 38a). He inquired as to the condition of the people in the Trumpold car, and he was told that no one was hurt (T. 8/3/87, p. 9; 39a).

No ambulance was called (T. 7/29/87, p. 65; 27a). Instead, the Trumpolds got into their car and drove home. Before going to the hospital to be checked, Linda Trumpold made some telephone calls (T. 7/29/87, p. 67; 29a).

The record from the hospital visit of July 21, 1981 indicated that Trumpold arrived at 5:15 and was discharged at 6:30 (T. 7/29/87, pp. 69, 70; 30a). At that time, he denied hitting any part of his body. He had no neck pain, no headaches, and no numbness except for the same problems which he said that he had prior to the accident (T. 7/29/87, pp. 70, 71; 31a). He acknowledged to the doctors at the hospital that he did have numbness prior to the accident (T. 7/29/87, p. 71; 32a). His complaint was of pain in the mid to lower back related to movements (T. 7/29/87, p. 70; 31a). Although they told him at the hospital that he should take two or three days of bed rest and apply moist heat, Trumpold called work the following day and told them that he would be out indefinitely (T. 7/29/87, pp. 57, 72; 33a, 34a).

The Trumpolds' car was appraised, and the estimate to replace the bumper was $75.00 (T. 7/23/87, pp. 8, 9; 6a).

Trumpold testified at length, attributing his back pain, inability to work, and inability to have a satisfying sexual relationship with his wife to the accident of July 21, 1981 (T. 7/24/87, pp. 37-45; 11a-20a).

Under cross-examination, Trumpold admitted that he had surgery on his low back in 1980, and that he had sought Social Security disability benefits more than one year prior to the accident, claiming that he was totally and permanently disabled from employment (T. 7/29/87, pp. 28, 29, 87; 21a, 22a, 35a). Trumpold's work record disclosed that he had missed 223 days of work in 1980 (T. 7/29/87, p. 55; 24a). From November, 1979 until July of 1981, he was absent from work approximately 255 days out of a possible 400 (T. 7/29/87, p. 56; 25a). He was out of work for a total of seven weeks in 1981 prior to the date of the accident (T. 7/29/87, p. 55; 23a).

In light of the evidence concerning the nature of the accident and the prior claims of disability, the Trumpolds' credibility on the issues of damages and causation was called into question by the defense.

REASONS WHY THE PETITION SHOULD BE DENIED

I. No federal question is raised by the decision below.

The Appellate Court did not base its opinion on a "non-existent critical fact." Nothing in the reported decision supports the petitioners' assertion that the Appellate Court "held that the jury in Trumpold could have found that Alfred Trumpold did not seek medical assistance immediately following the accident, but instead consulted an attorney." (See petitioners' brief, p. 15; appendix to petitioners' brief 1A–10A). The reported decision contains a reference to the defendants' arguing that the Court properly allowed the evidence because Linda Trumpold's actions following the accident tended to corroborate the defendants' version of the occurrence, because Alfred Trumpold did not seek medical assistance immediately following the accident, but instead consulted an attorney. (19 Conn. App. at p. 26; appendix to petitioners' brief 4A). The Appellate Court then stated:

> After reading the transcripts and considering all other relevant information, we agree with the defendants that asking the plaintiffs when they first contacted their attorney following the accident was permissible on these particular facts. Under other factual circumstances, such evidence might be inadmissible.
>
> (19 Conn. App. at p. 26; appendix to petitioners' brief 4A).

Thus, the petitioners' claim that the Appellate Court based its decision on a "non-existent critical fact" is groundless.

The petitioners' claim in the first question presented (apart from that concerning a "non-existent critical fact") appears to be that the evidence that Linda Trumpold called her lawyer the next day is not relevant. (See petitioners' brief, p. 18).

Rule 611(b) of the Federal Rules of Evidence sets out the permissible scope of cross-examination:

> Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of witnesses. The Court may, in the exercise of discretion, permit inquiry into additional matters as if on direct exam.

According to *McCormick on Evidence*, the first function of cross-examination is to shed light on the credibility of the direct testimony:

> As to the first function, that of evaluating the credibility of the evidence given on direct, . . . the test of relevancy is not whether the answer sought will elucidate any of the main issues, but whether it will to a useful extent aid the Court or jury in appraising the credibility of the witness and assessing the probative value of the direct testimony.
>
> *McCormick on Evidence* (3rd Ed.) Section 29, p. 63.

In both civil and criminal cases, the scope and extent of cross-examination with respect to an appropriate subject of inquiry rests in the sound discretion of the trial court. (See *Alford v. United States*, 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624 (1931); *Smith v. Illinois*, 390 U.S. 129, 88 S.Ct. 748, 19 L.Ed. 2d 956 (1968); *Glasser v. U.S.*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680, reh. den. 315 U.S. 827, 62 S.Ct. 629, 86 L.Ed. 1222 (1942)). This Court has held that no obligation is imposed on a trial court to protect a witness from being discredited on cross-examination, short of an attempted invasion of his constitutional protection from self-incrimination, properly invoked. (See *Alford v. United States*, 282 U.S. at 693-694).

The Appellate Court's holding that the trial court did not abuse its discretion in making its evidentiary ruling was

in accord with both state and federal law and did not violate the petitioners' constitutional rights.

II. The question on cross-examination complained of by petitioners did not elicit information protected by the attorney-client privilege.

Rule 501 of the Federal Rules of Evidence provides:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, state, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the Courts of the United States in light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

In its decision, the Appellate Court, citing *State v. Manning*, 162 Conn. 112, 120, 291 A.2d 750 (1971), noted that the Connecticut Supreme Court held that Connecticut is in accord with the majority rule that the attorney-client privilege does not extend beyond communications and that an attorney is not bound to remain silent as to all information regarding his client, but only as to that information born of confidential communication. The Appellate Court held:

> Because our law is clear that the privilege applies only to "information born of confidential communication," we decline to hold that the trial court's evidentiary ruling that permitted defense counsel to ask the plaintiffs, as witnesses, when they first con-

tacted their attorney violated the confidentiality of their privileged communications. (19 Conn. App. at 28; appendix to petitioners' brief 6A).

In a footnote, the Appellate Court declined to examine the plaintiffs' state and federal constitutional claims in this regard "[i]n light of our holding that defense counsel's questions did not abridge the plaintiffs' attorney-client privilege." (19 Conn. App. at 28; appendix to petitioners' brief 6A).

Beyond the above, Connecticut is in accord with federal law on this issue. Federal courts have held that the identity of a client or the fact of being a client of an attorney is not privileged information. *Colton v. United States*, 306 F.2d 633, 637 (2d Cir. 1962); *United States v. Bohonnon*, 628 F.Supp. 1026 (D.Conn. 1985); *United States v. Ricks*, 776 F.2d 455 (4th Cir. 1985), on rehearing 802 F.2d 731, cert. denied *King v. United States*, 479 U.S. 1009, 107 S.Ct. 650, 93 L.Ed. 2d 705 (1986).

Since no privilege attached to the fact that Linda Trumpold called her lawyer, the trial court properly admitted the evidence, and there was no violation of the petitioners' constitutional rights.

CONCLUSION

The federal questions presented in the Petition for a Writ of Certiorari are spurious. The petition should be denied.

Respectfully submitted,

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No. _____

In The
Supreme Court Of The United States

OCTOBER TERM, 1989

ALFRED TRUMPOLD AND LINDA TRUMPOLD
Petitioners

v.

ROBERT BESCH AND THE
DOUGLAS BATTERY CORPORATION
Respondents

APPENDIX TO
RESPONDENTS' BRIEF IN OPPOSITION
TO CERTIORARI TO THE APPELLATE COURT
OF THE STATE OF CONNECTICUT

APPENDIX TABLE OF CONTENTS

Excerpts from direct examination of Linda Trumpold, 6/8/87, pp. 20-23

A Yes. We waited for the light to change.

Q In other words, was it just when you got there that this —

A No.

Q — event occurred?

A We had already been stopped.

Q Now, what do you remember about that being struck from behind?

A Well, I was talking to my husband, I was showing him where the driveway was for the — I was pointing, like saying "She said there is a driveway behind the Thrifty Lady and a parking lot and we can pull in there and it will be easier to show her the clothes", and all of a sudden, smash. I felt like I was thrown forward; I heard a big bang and I couldn't see.

Q And did you feel anything in your body at this time?

A Yes, my neck hurt a lot.

Q Could you feel yourself move in any way?

A I don't understand.

Q Could you feel your body move at all?

A I felt like I was thrown forward and like my head snapped, like jerked.

Q And just before this happened, how were you feeling?

A Fine, except hot.

Q And then after this initial impact, what happened?

A Well, I couldn't see. I heard my husband moaning. My daughter was crying like she wanted to get out of the car. I was —

Q Do you recall anything she said?

A No, I don't. She was just afraid. I remember she wanted to get out. She didn't want to be in the car.

Q Is this what she said?

A Yes. I was reaching like — I was going like this for the door handle, but I couldn't find it because I couldn't see.

Q Gesturing with your right hand?

A With my hand. I wanted to get out of the car and I couldn't find it and I was getting scared, and my eyesight came back. I looked at my husband and he was holding the steering wheel like this and he was like looking into the rear-view mirror and he said that — I said to him, "What happened?" And he said, "We just got hit."

Q You said he was holding the steering wheel —

A The steering wheel.

Q — like this.

A Well, he had like —

MR. JACOBS: Is Mrs. Trumpold's demonstration of how her husband is holding — is that visible on the picture?

MR. MORRISSEY: Yes.

Q Because you indicated —

A Like tight.

Q — a clutching of the steering wheel?

A Yes.

Q All right. Go on. I didn't mean to interrupt.

A And he had like tears coming — like, you know, he wasn't crying, but there was like water coming out of his eyes and he was like, you know, looking in that mirror like he was in a lot of pain. And I jumped out of the car. I just wanted to get out and it was like I — I couldn't think straight; I didn't know what was happening. I knew we had been hit but I didn't know what to do. I just knew I wanted to get out of the car. I even forgot that Jennifer and Michael were in the back seat. You know, I felt terrible later on when I remembered that they were in the back, because I don't know why I didn't think of it. I guess it was just because I wanted to get out so bad. And then I got out.

Q And you got out the right-hand —

A Yes.

Q — passenger door in the front?

A Yes.

Q And what did you do when you got out?

A Well, I remember I was very panicky. My heart started pounding. You know, I was afraid. I didn't know what I wanted to do. I just wanted to get away from there.

Q What were you afraid of?

A Well, first I thought the car was going to explode and I don't — you know, I mean that's terrible because I left the kids in the car, but I forgot about them. After I was talking to Mr. Besch, I said, "Oh, my God, the kids are still in the car", you know, and I went back to talk to them. But before that, I was so afraid that, you know, I wanted to get out. I was afraid it was going to blow up and I couldn't think straight and I just wanted to get away from there.

Q Had you ever been in an automobile collision before?

* * *

Excerpts from testimony of Steven Guarini, 7/23/87, pp. 8-9

A Or even get the serial number off the car.

Q I see. And all you could say is how it was back on the 21st of September, 1981, no damage to the lens?

A Right.

Q And then you had the point of impact, right? What did you say about that?

A Rear direct.

Q And then with regard to the condition of the car?

A Paint was poor, the interior was worn, and the mileage was around the clock, over a hundred thousand miles.

Q I see. So up there it says mileage, what do you have for mileage?

A It shows twelve thousand, three hundred and eighty-nine, but it's circled, meaning that it's around the clock.

Q A hundred and twelve thousand, three eighty-nine.

A Right.

Q Is that an 8 or a five? Can you tell?

A It looks like an 8.

Q Okay. Did you proceed to do your appraisal to figure out what the value of this loss was?

A Right.

Q And if you would sir, just show us what items you referred to and how you arrived at your figures?

A Looking at the car I felt the rear bumper needed to be replaced. Given the overall condition of the car it didn't justify a brand new bumper or even a rechrome. I would have gone for a rechrome bumper had I not been able to find a used bumper, given the condition of the car I wrote it for a used bumper.

Q Okay. And just what did you do? What numbers did you come up with? How did you arrive at them?

A Flat rate labor to install the bumper is 1.2 hours. The price quoted by the salvage yard was seventy-five dollars. The trunk lid I had —

Q Just stick to the bumper. So how much was that for the bumper?

A The bumper was seventy-five dollars for the part, plus sales tax and 1.2 hours at twenty-two dollars an hour.

Q How much did that come out to? Do you need a calculator?

A No.

Q Here's a calculator, if it will help you.

A It comes to twenty-six forty for labor. Twenty-six dollars and forty cents for labor.

Q How much did you save for the used bumper?

A The used bumper was seventy-five dollars, plus tax. Total cost of the bumper, labor part and tax came to one 0 seven 0 two.

Q That was a used bumper, wasn't it?

A Correct.

Q Now, supposed you used a rechromed bumper. You ***

Excerpts from direct examination of Alfred Trumpold, 7/23/87, pp. 74-76

Q From the time that your car stopped there, until it was struck from behind, did the color of the traffic signal ahead change?

A No sir.

Q What color was it at all times?

A It was red.

Q From the time that you stopped your car there, until it was truck from behind, did any of the cars ahead of you at that red stoplight move?

A No sir.

Q Now will you please describe just what you felt when your car was struck from behind?

THE COURT: Mr. Jacobs, I don't want to interrupt you, but if you're not going to use the picture, he should be back on the stand.

MR. JACOBS: I think that's right, your Honor, thanks. I didn't want him going up and down and perhaps I hope I'm through because I don't want to make him keep going up and down. Thank you. Well, Mr. Trumpold, about how long had your car been at that light before it was struck?

A About a minute and a half, two minutes.

Q A minute and a half — what?

A A minute and a half, two minutes.

Q Okay. An appreciable time.

A Yes sir.

Q Okay. You hadn't just come there.

A No sir.

Q And before your car was stopped from behind, did you observe whether there was any car stopped behind yours?

A No sir, there wasn't any car behind me when I stopped.

Q And what was the first that you knew that there was a car behind yours?

A When I got hit.

Q And when you got hit, what did you feel like?

A It's like somebody grabbing a hold of you and just, you know, throwing you forward and pulling you back.

Q And at the time your car was stopped there, where was your right foot?

A On the brake.

Q And was that during the whole time?

A Yes sir.

Q Including when your car was struck?

A Yes sir.

Q And when your car was struck, did you hear anything?

A Yes sir.

Q What did you hear?

A A crash.

Q Now the place beside the road towards the right that's the Keeling (phonetic) Company?

A Yes.

Q Keeling?

A Keeling Glass Company.

Q What's that?

A Keeling Glass Company.

Q Yes. And you heard Mr. Michael Slocum (phonetic) testify here at the beginning of this case did you?

A Yes sir.

Q He said that he worked there?

A Yes sir.

Q Did you know Mr. Slocum?

A No sir.

Q Now when your car got hit, you told us how it felt to you.

A Yes sir.

Q Did you feel any bodily sensation?

A Yes sir, I felt pain in my back.

Q In what part of your back?

A The lower part.

Q And when was this with respect to when this event occurred?

A Like a couple of seconds after we got hit.

Q And what did you do at the time that this happened?

A What did I do?

* * *

Excerpts from direct examination of Alfred Trumpold, 7/24/87, pp. 37-45

Q All right. Just tell us what there was about the job and what there was about the condition you were in to make those two things not doable at the same time.

A Well, my job at Pratt and Whitney consisted of alot of bending, alot of lifting, excessive amount of walking.

Q How much walking?

A Alot.

Q Just describe that for us. I've got some idea of the length of the place.

A All right. The length of Pratt and Whitney is roughly a quarter of a mile long, the building. From the parking lot to the center of the building is roughly one eighth of a mile. We used to have to walk that in and out. The cafeteria is downstairs for lunch or supper, whichever shift you were working. That consisted of almost all the way out to the building because the cafeteria doors were just maybe a few feet down the hall from where you came in. In Pratt and Whitney you go down to a tunnel which went full length underneath the building and it would have stairways going up at different intervals through the floor and you found which one you'd take. Roughly it would be the shortest one going to your department. That was in the very front of the building where the tunnel goes through. It's off of that tunnel where that cafeteria is.

Q And so I guess you've given us some idea of the size of the place.

A Yes sir. It's a very good size building.

Q So what was there about the things you had to do over at Pratt and Whitney you couldn't do because of how you were feeling between the 21st of July and the 27th of August 1981?

A What I couldn't do?

Q Yes. I mean, why didn't you go back to work?

A Well, like I said, I couldn't do the walking. I couldn't do lifting. I couldn't do the bending. You know, I couldn't stand up for a length of time or sit down for a length of time. I had to lay down most.

Q Incidentally, now do you have any trouble standing up for a length of time now or sitting down for a length of time?

A Yes. Like right now it's bothering me.

Q How's that?

A Right now I'm getting alot of pain from sitting down. I can sit down roughly for like an hour, hour and a half. Then it starts to get to me.

Q Just what is it that gets to you, Mr. Trumpold?

A It's a nagging pain. It's very nagging. It's hard to describe. The only — I don't know. I don't know really how to describe it. It's like somebody has a knife in there and they are turning it back and forth. That's what it feels like.

Q It comes on you when you've been sitting for a while?

A Yes. It starts progressively getting worse, you know. It just starts off and just keeps going and going. It just keeps like magnifying, I guess you'd call it.

Q And what do you do about it?

A There's not much you can do about it. Just get up and walk around. That helps relieve it some. Sometimes if it's real bad I lay down. It's about all you can do.

Q What about standing up for a long time? Does that give you any problem?

A Standing up does the same. It gives you alot of pain between your back and your leg. It's basically the same kind of pain only — I don't know whether it's nerves or what. They go down your leg. You can feel it in there. It's like it's pulling.

Q It's when you are standing?

A After a while, yes.

Q Uh-huh. So now we are back in the summer of 1981 and you were telling us why you couldn't go back to work at Pratt and Whitney.

A Yes sir.

Q And had you pretty well described what your range of your activities was during that time?

A Yes, I guess. There's not very much.

Q How did you feel about that?

A It bothered me. I'd rather be working.

Q And a typical day of work, how did you feel about it?

A About work?

Q Yes.

A I love to work. I used to go in. There's another fellow that run the productor right beside me. There's like two machines. There would be one here and there's one here. There's one platform in between and there's a table on it with our gauges. He's be running this machine and I'd be running this one so we'd be there together basically all day. We'd sit there and we'd talk about different things and machines and different operation and stuff like that. He had been there a little bit longer than I was. He used to tell me about some of the people that worked there before and stuff like that. The foreman would come by and kid. Where our machines was is right beside the general foreman's office. He used to come out and sit down and chew the fat for a little while. It was nice. We had a very good relationship with everybody basically.

Q How did your work day go? Did it drag?

A Oh no. It went by fast.

Q Then you'd go home and be with your family?

A Yes sir.

Q How was the anticipating of that for you?

A What? Going home?

Q Yes.

A Oh, I loved going home. You know, like getting out of work and going home and seeing the wife and kids. It was like, I don't know, the Brady family. You know. Everything is perfect and that was the way it was going. Everything was good.

Q I want you to think mostly back to the time when you returned to work after Doctor Cramer cleared you to return to work on June 3rd, 1981 through the 21st of July, 1981. How was it during that period?

A It was good.

Q Is it the way you just described to us?

A Yes sir.

THE COURT: I'm going to give the Jury a five minute recess at quarter after to just let you know.

MR. JACOBS: Okay.

THE COURT: You've got seven more minutes.

MR. JACOBS: So Mr. Trumpold, your days during that summer of 1981, how did they go by when you weren't working?

A Well, the summer — well, actually every day passed by quickly. It seemed like years were going by real quick.

Q What I'd like you to think about is how was it during this summer when you — after you had gotten hurt on the 21st of July? I think we all agree our time is flying.

A You mean after the accident?

Q Yes.

A Time dragged. It was very boring, very depressing.

Q Please describe what you mean when you say it was boring.

A When you are an active person like I was and then all of a sudden you can't and you've just got to sit there, lay there, it seems like every minute is an hour long.

Q And you said it was depressing.

A Yes sir.

Q Why did you say that?

A Because I couldn't work.

Q Why were you depressed because you couldn't work?

A Because I like to work.

Q Just before this collision occurred how were you doing as far as earning money?

A Good.

Q Because you had been out in the spring, hadn't you?

A Yes.

Q And you had gotten back to working again?

A Yes.

Q And when was it about the time you and Linda were looking for a house?

A I would say that was the spring of '81.

Q Spring of '81?

A Yes.

Q When you were working or while you were out?

A I think a little bit of both.

Q Uh-huh. So you were planning to get a house?

A Oh yes. We looked forward to it.

Q Planning to keep working?

A Sure. Definitely.

Q Okay. That summer was — were the days like one another? Did they differ from one another?

A I don't know what you mean.

Q In other words, do you remember any variety about what happened to that summer or were things pretty much the same?

A Well, like I said, we were looking for houses. We were excited about that.

Q I'm sorry. I'm talking about the summer right after you got hurt.

A Oh. After I got hurt?

Q Yes.

A Then we weren't doing anything. As I said, it was very depressing.

Q Uh-huh. Was there any variety in your routine?

A Not really, no. I'd just sit there, lay there. You know, you can't do anything.

Q Did you go out of the house and go drive some places?

A I tried, yes.

Q What do you remember about that?

A Let's see. I remember we went shopping.

Q How was Linda doing during this time?

A What? After July?

Q Yes. During that month of — from July to the second time you saw Doctor Fasano.

A She was getting better. You know, her neck didn't bother her as much. She started getting a little hesitant about going outside. She didn't really want to get in the car.

Q Uh-huh. How were you two getting along?

A I would say we were getting along good.

Q Even though you both weren't feeling so good?

A Right. I mean, we could understand one anothers problems.

Q Uh-huh. How had you been getting along before this collision?

A Very good.

Q You went out. After a while you went out shopping and stuff, driving?

A Yes.

Q In other words, you weren't confined to the home or anything like that?

A No.

Q You were doing the driving after a while?

A Yes sir. It would drive me nuts if I had to sit there besides my wife driving, you know. I don't know. I guess you have to feel like a macho man and you do the driving.

Q What car were you using?

A We were using the Buick.

Q Now how were you and Linda doing as far as your physical, your sexual relationship, right after July 21st, 1981?

A None.

Q None?

A None.

Q And how long did that continue?

A I know it was all between the time of the accident until I went to see Doctor Fasano the second time.

Q You had no sexual relations at all?

A No sir.

Q Why was that?

A Basically because, you know, at the very beginning we were both in alot of pain. After that my back was still bothering me alot. I was scared to really try.

Q Why were you scared?

A Well, it's hard to describe. When you are lying down, if you start moving around in your bed you are not really getting the — like good control over your body. It's the only way I can describe it. Your body will twist and stuff at times, you know, in the mattress, you know, while you are laying in the mattress. When it does that it hurts. At that time I didn't even want to think about doing it.

Q And how did you feel about that?

A I didn't think much of it but my wife did.

Q What do you mean?

A She wanted to try it. I told her I was scared to.

Q Did she tell you how that made her feel?

MR. ZEMETIS: Well — I'll withdraw it. Go ahead.

A She kept indicating that she thought that it was her fault and not mine. I kept telling her — I said it's not you. I said I just don't want to try it because of my back.

MR. JACOBS: So between those two dates you said that you didn't have any sexual relationship?

A No.

Q How did that make you feel?

A Like I said, to me — I guess I had it justified in my own mind that I didn't want to do it so I kind of accepted it but my wife didn't. It bothered her alot.

Q Having to come to terms with it and accept that you couldn't have this relationship with your wife, how did that make you feel?

A Not very good.

THE COURT: All right. We'll take a five minute recess at this point. Ladies and gentlemen, I'm cutting short the recess because we are only going to go to twelve o'clock. I'll ask counsel to be ready to go in five.

(Whereupon, a recess was taken at 11:17 a.m. and resumed at 11:23 a.m.)

* * *

Excerpts from cross examination of Alfred Trumpold, 7/29/87, pp. 28, 29, 55-57, 65, 67, 69-73, 87

MR. ZEMETIS: Z-I-E-D-M-A-N.

THE COURT: Okay.

MR. ZEMETIS: And you saw Dr. Ziedman?

A Yes sir.

Q And he's in Cheshie, right?

A Yes sir.

Q You saw him on three occasions?

A Yes sir.

Q Now, when you went to each one of these doctors, did you tell each one of these doctors — Let me start this again. You went to Dr. Poverman, Dr. Ziedman and then you went to Dr. Greenwald?

A Yes sir.

Q With regard to each one of those three doctors you went to them because you were suffering from a low back problem?

A Yes sir.

Q And you were in excruciating pain?

A Yes sir.

Q And your symptoms were low back, right sided, right leg, numbness, pain going down the leg, all three of them?

A Yes sir.

Q As a consequence of that you went into St. Raphael's Hospital in February of 1980 and you had a disc removed partially?

A Yes sir.

Q And that was on the right side, was it not?

A I guess so.

Q L4/L5 on the right and if we pull out the record it would read the same thing?

A Yes sir.

Q All your problems were right sided?

A Yes sir.

Q After that time, February of 80, you were under the care of Dr. Greenwald exclusively?

A Yes sir.

Q In June of 1980 you tried to go back to work?

A Yes sir.

Q They required you to sign an acknowledgement of defect, that you had a defective low back laminectomy L4/L5 on the right?

A Yes sir.

Q You signed that?

A If I didn't I couldn't go back to work.

Q You signed that?

A Yes sir.

Q And you gave that to Pratt and Whitney and Mr. Jacobs exhibited that to the Jury?

A Yes sir.

Q You worked three days?

A Yes sir.

Q And you were in such excruciating pain that you ***

* * *

A No sir.

Q You had six weeks off in April and May?

A Yes sir. Just for Dr. Kramer.

Q Well six weeks off there?

A Yes sir.

Q You had a week off in February?

A Yes sir.

Q You went down to the nurse on nine pages worth of notes between November of 1980 and July, 1981.

A November of 80?

Q November of 80. That's when you went back to work. You had all those back problems and you were trying to find a machine that would accommodate you.

A Medical records, yes sir.

Q Alright. If you add those up sir, and the employer does add them up.

A Yes sir.

Q You know. You looked at all these records?

A Yes sir. I know Pratt and Whitney —

Q In 1980 you missed two hundred and twenty-three days.

A Yes sir.

Q You worked five days a week?

A Yes sir.

Q Fifty-two weeks a year?

A Yes sir.

Q Take off two weeks for vacation?

A Yes sir.

Q Take off what about ten or twelve days for holidays?

A Something like that.

Q You worked something in the area of eight or nine days that year?

A Yes sir.

Q The next seven months of employment, at least from the records that I can see you missed thirty-two days of work?

A Yes sir.

Q In those seven months there was twenty working days a month?

A Yes sir.

Q You're out thirty-two out of that?

A Yes sir.

Q If I add them up from November of 80, excuse, November of 1979 until July of 80, for a period of about eighteen months, you were absent from work approximately two hundred and fifty-five days out of a possible four hundred?

A Yes sir.

Q About 62% of the time you were not there?

A Yes sir.

Q Does that seem right to you?

A Yes sir.

Q Now you told me that when you're out of work for, not coming in for a day you call in?

A Yes sir.

Q And you saw those work records that I showed you a moment ago with the daily notations of whether you're there or you're not there, right?

A Yes sir.

Q Looking at the chart each day, labeled out right? Correct?

A Yes.

Q July 22, you called in didn't you? July 22, 1981, the day after this collision, you called in?

A Yes sir.

Q You told them a car accident, out indefinitely?

A Yes sir.

Q Okay. Now you have been to the World War II Veteran's Memorial Hospital the night before, correct?

A Yes sir.

Q And they told you to take two to three days of bed rest, apply some moist heat?

A Yes sir.

Q When you called in you told them you were out indefinitely?

A Yes sir.

Q Now sir, July 21, 1981, automobile accident happened at Quinnipiac Street, correct?

A Yes sir.

Q It happened around four thirty in the afternoon?

A Yes sir.

* * *

* * *

A Yes sir.

Q And that's what you're claiming here, right?

A Yes sir.

Q And you're claiming that your wife got out of the car and she also made complaints that she was injured?

A Yes sir.

Q Right there at that scene?

A Yes sir.

Q And you told that to Mr. Besch?

A Yes sir.

Q Okay. And did you call the ambulance?

A No sir.

Q Did you call the emergency medical technicians?

A No sir.

Q Did you call the police?

A No sir.

Q Did you call the fire department?

A No sir.

Q Did you call a neighbor?

A No sir.

Q So as I understand it, you're hurt and your wife is hurt, is that right?

A Yes sir.

Q And you're right here in the middle of a beautiful day, in the middle of the downtown are, Wallingford?

A Yes sir.

* * *

*** those things, did you sir?

A Mr. Besch didn't want to, no sir.

Q You didn't so anything?

A No sir.

Q You were hurt weren't you?

A Yes.

Q And your wife was hurt?

A Yes.

Q And you just didn't do any of those things, that's what you would have us believe, right?

A Yes sir.

Q Okay. Then you got in your car and you drove home?

A Yes sir.

Q When you got home, is it your testimony that your wife had started making calls to various people to get instructions about what she ought to do?

A No sir.

Q Did your wife call her father?

A Yes sir.

Q And who else did she call?

A The police station.

Q Who else did she call?

A That's all I know before we went to the hospital.

Q I see. Is it your recollection that she called Att. Jacobs that night or the next morning?

A I don't —

* * *

***hospital?

A I don't believe so, no sir.

Q Do you remember if it's when you came back from the hospital?

A No sir, I think it was the next day after we got back from the police station.

Q Your wife has said she called him before she went to the police station, is that your recollection or you don't recall?

A I don't remember exactly sir.

Q Alright. Is that before you called into work?

A I called into work the morning of the 22nd.

Q Before you called Mr. Jacobs or afterwards?

A I don't remember.

Q Now when you went to the World War II Veteran's Memorial Hospital on 7-21, in the afternoon, did you tell them anything was bothering you?

A As far as I can remember, yes sir.

Q You had x-rays there?

A Yes sir.

Q They did a complete examination on you there?

A I guess.

Q You were there sir, you tell us.

A I don't know exactly, you know, what you mean by a full examination.

Q Mr. Trumpold, you have a medical history that is five inches thick, you don't know what a medical examination is.

A Well compared to the other doctors that have seen me, no sir they didn't.

Q Alright. Well that's what I asked. You got in there at five fifteen and you were discharged at six thirty?

A Yes sir.

Q Seem right to you?

A Yes sir.

Q And that includes the time that you had to wait, the time that they took the x-rays?

A Yes sir.

Q And the time of the examination?

A Yes sir.

Q And from the time you gave them your complaints and problems at that point?

A Yes sir.

Q And you denied hitting any part of your body, right?

A Yes sir.

Q You had no neck pain?

A No sir.

Q And you had no headaches?

A No sir.

Q And you had pain in the mid to lower back related to movements?

A Yes sir.

Q And you had no numbness except for the same problems that you've been having prior to the accident?

A Yes sir.

Q So did you acknowledge to these doctors that you were having numbness prior to the accident?

A A certain amount, yes sir.

Q And you denied any other problems?

A Yes sir.

Q And you were walking. You were in no distress?

A Yes sir.

Q So the next morning you called into Pratt and Whitney, you told them you would be out indefinitely?

A I don't know the exact words, sir, but I remember I called in and said that I wouldn't be in. I think they put the indefinite in afterwards.

Q You ever seen that record?

A Yes sir.

Q And why do you say they put that on afterwards?

A Well, they could write it in at anytime.

Q Oh I see. Before when I asked you that question you told me yes, you told them you were going to be out indefinitely.

A As —

MR. JACOBS: Excuse me. He was making an answer. May he be allowed to complete his answer?

MR. ZEMETIS: Alright. He nodded to me. I think we better get it on the record. Is that right sir?

MR. JACOBS: May the tape be played back Your Honor, because I think we have one more episode of the plaintiff not being allowed to answer? May the record be played? Mr. Zemetis, maybe will understand the point. I'm sure he's not doing this intentionally. Maybe he'll understand the point that I'm making when he can hear himself on the record, interrupting Mr. Trumpold.

THE COURT: I'm not going to play the record back. I heard what was going on here. Put the question.

MR. ZEMETIS: Thank you sir. Mr. Trumpold, is it accurate that you testified previously that on 7-22-81 you called Pratt and Whitney and told them you'd be out indefinitely?

A That's what it says in the records sir.

Q I'm not asking what it says on the record. I'm asking you, didn't you ever testify to that here about forty-five minutes ago?

A Yes sir, I testified to what was written in the record.

Q I'm not asking you what was in the record now. Listen very carefully I asked you if that's what you told them on that date sir.

A The answer that I gave you is for what was standing in the record. I know I called in, exactly what was said I cannot say for sure. I do not believe I said indefinite.

Q You don't remember what you said anymore?

A No sir.

Q You want to change the answer that you gave before?

A Like I said, the answer that I gave you before was what I figured must have been said, because it's in the Pratt and Whitney record. That's all I know is what it says in the record.

Q You don't have any recollection of what you said at all?

A I know that I called in and said I was in a car accident and that I wouldn't be in.

Q Alright. With regard to being out indefinitely which the record says you don't know if you told them that then or if they doctored the records later on and put that in?

A Yes sir.

Q But isn't it accurate, sir, that when you went to the hospital in Meriden they told you you were going to be out two or three days of bed rest?

A Yes sir.

Q Or put some moist heat on?

A Yes sir.

Q Alright. Now, excuse me, a couple of days after this accident you went to see Dr. Fasano?

* * *

A Well what do you consider substantial?

Q I'm not going to debate it with you sir. Is it true that in June of 1980, the year before this accident happened you signed an aplication for social security, disability benefits indicating that you were totally and permanently disabled from gainful, substantial employment?

A I applied for social security, yes sir.

Q I asked you if you had signed that application for that?

A I don't know exactly what form it was, but I did apply for social security, yes sir.

Q Social security, disability benefits, right?

A If that's what it was I guess so, yes sir.

Q A year before this accident?

A Yes sir.

Q In your mind at that time, you were totally and permanently disabled from substantial and gainful employment?

A No sir.

Q So you filed an application with the United States Government for other reasons?

A No sir.

Q Now in April of 82 you had low back surgery with Dr. Frankel, correct?

A Yes sir.

Q And when you were leaving the hospital didn't they give you instructions about what to do?

A Somewhat yes.

* * *

Excerpts from direct examination of Robert Besch, 8/3/87, pp. 5, 6, 8, 9

*** me.

Q And how many cars were ahead of you?

A An approximation would say anywhere from five to seven cars.

Q Alright. Were cars stopped behind you, do you recall?

A There were cars behind me.

Q Alright. Well, what happened then after you stopped on this road?

A Well we were sitting there waiting for the light to change, waiting for the traffic to move ahead. And the car in front of me had moved ahead and then stopped quite abruptly. Not being able to see any brakelights on the car and moving ahead along with the flow of traffic, the car ahead of me suddenly stopped and I inadvertently tapped him on the bumper.

Q You said that this whole line of cars was stopped at a red light. Can you tell me how it was that this line of cars started to move forward?

A Well as you might have experienced yourself, it appeared as though they were taking up slack that had been from positioning themselves to the light and they all sort of moved up a few feet or pulled ahead, whatever. Not able to see the cars any further then what was just ahead of me I'm assuming that's just what they did.

Q Alright. And after the front of your car, well what parts of the cars came into contact with one another?

A Well it was the front of my car and the rear of the car in front of me, rear bumper.

Q Now, did you get out of your car at that time?

A After the tap I put the car in park and I sort of sat there for a moment waiting for maybe the occupants to turn around and me to signal to them sorry, it was just a tap, everybody alright, but it then appeared as though a lady had stepped out of the passenger side and at that time I felt well we better get out and really have a look and see what we've done.

Q When you say we, was there anyone else in the automobile with you?

A Well, no, myself.

Q Okay.

A I'm saying to myself.

Q Okay.

A I should get out then and present myself.

Q Did you?

A I did. I walked around, looked at the front of my car to assure myself that the amount of noise which was just a small tap, and could be nothing more than just that. So I walked around the front and observed the car in front of me and by this time a lady had walked back and stood at the right rear quarter panel of the car. And I said to her, "gee I'm sorry."

Q Okay. Just a moment. Before you go any further. You got out of the driver's side of your car?

A Yeah.

Q You walked between the two automobiles?

* * *

* * *

Q Where was it taken?

A That was taken in my driveway.

MR. ZEMETIS: I'm offering it as a full Exhibit Your Honor.

THE COURT: It may be marked as a full Exhibit. Defendant's 3 I believe it is.

CLERK: Yes, Defendant's Exhibit 3.

MR. ZEMETIS: Thank you.

Introducing Defendant's Exhibit #3:

MR. ZEMETIS: Ladies and gentlemen, I hold before you Defendant's Exhibit #3, the photograph, which is the front of Mr. Besch's car. And Defendant's Exhibit #2, which is the rear of Mr. Trumpold's car after this collision occurred. And I think what I'll do is I'll just pass them so that you can look at it as much as you care to. All set? Mr. Besch, you indicated, if you can just stay where you are, could you show us where the damage to your car was as a result of this?

A Let's see, it was right on the bumper guard here.

Q Right on the bumper pad?

A Yeah, on the bumper pad.

Q A black bumper?

A Yeah it would be the black section right over here.

Q Was there any other damage to your automobile?

A None whatsoever.

Q Was there a radiator broken?

A The car had no radiator breakage, no damage whatsoever.

Q Okay. Let me pick up where we dropped off. You said you got out of the automobile, you observed the automobiles. And then what did you do?

A I looked at both automobiles, saw that there was no damage to my car. I couldn't see any damage to the car in front of me. I once again said to the lady, "I'm sorry, is everyone okay?" "Is anyone injured?" She walked back to the car and put her head in the car and says, "Is anyone injured?" She came back, no one is injured. So I said, "Well, again I'm sorry." "Here's my card, my business card." "You're welcomed to have that." I said to her, "would you like for me to call the police, we can file an accident report here now and take care of it?" By this time Mr. Trumpold had gotten out of the car and walked back. He didn't say anything. He looked at both cars front and rear. I said, "are you alright?" "Yes." "Would you like to call the police?" "We can call the police here." He looked again for a moment, looked. I was waiting for him to say something. Finally he said, "Well it doesn't look like there's much damage." "Anybody hurt?" He said to his wife and the children in the car, indicated no. And I said, "Well, alright, sorry once again." He got back into his car, I got in my car and we both drove off. It was a period of time maybe five/six minutes.

Q Di you obtain their names and so forth?

A Yes I did, yes. Because I had only been with the company a short period of time and we do have a procedure of things that you do in case of an accident I acquired their names.